

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ALLEN HOLOWESKI,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 278029

Oakland Circuit Court

LC No. 03-190273-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as on leave granted from a sentence entered following his plea of guilty to a probation violation. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with nine different counts, including possession of a firearm by a felon, possession of a firearm during the commission of a felony, assault with a dangerous weapon, possession of a controlled substance, and assault and battery. Defendant pleaded guilty to possession of a firearm by a felon; possession of a firearm during the commission of a felony; possession of a controlled substance, second or subsequent offense; malicious destruction of personal property; and two counts of domestic violence. Defendant was sentenced as an habitual offender to five years' probation for his felon in possession of a firearm conviction.

The instant appeal arises out of the subsequent bench warrant that was requested. Defendant had allegedly violated his probation by being involved in assaultive, threatening, and intimidating behavior; failing to complete mental health treatment as directed; and failing to pay court-ordered assessments. At the probation violation hearing, defendant's attorney stated that defendant was not guilty of the above allegations. An unidentified person asked the court to amend defendant's probation violation to read that defendant had absconded from a courtroom on a prior occasion and had failed to report since. The court agreed to amend the probation violation and stated that the court "has memory of it actually." Defendant was sworn in, and the court explained that defendant was alleged to have left the courtroom and failed to report. The court told defendant that he could have a hearing on this allegation or he could plead guilty, and defendant pleaded guilty. The trial court sentenced defendant to 30 months to 20 years on the possession of a weapon by a felon conviction. Defendant moved to vacate his guilty plea to the probation violation; the trial court denied the motion. This Court denied defendant's application for leave to appeal, but our Supreme Court remanded for consideration as on leave granted.

A post-judgment motion to withdraw a plea is reviewed by this Court for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999). Defendant contends that his plea was not knowingly made because of the sudden change in the charges against him and his inability to consult with counsel before being asked whether he wished to enter a plea. Defendant also contends that the trial court impermissibly failed to establish a factual basis to support his plea. We agree that these procedural errors are of sufficient import to constitute a miscarriage of justice, so it was an abuse of discretion to deny defendant's motion to withdraw his plea.

"A defendant is entitled to receive written notice of a probation violation sufficiently in advance of the scheduled revocation hearing to allow him a reasonable opportunity to prepare his defense." *People v Irving*, 116 Mich App 147, 151; 321 NW2d 873 (1982). It appears that defendant received notice of the initial allegations, as his attorney stated on the record that defendant was not guilty. After defendant's denial of the initial allegations, the violation was amended to state that defendant absconded from the courtroom on March 1, 2006, and subsequently failed to report to his probation officer. The transcript reveals that defendant was not given anything in writing regarding the amended allegations or given an opportunity to consult with his attorney. Although the allegation was relatively simple, see *People v Hanson*, 178 Mich App 507, 510-511; 444 NW2d 175 (1989), we find that defendant did not receive notice of the probation violation sufficiently in advance of the hearing.

More importantly, MCR 6.302(D)(1) provides that "[i]f the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." We review the adequacy of the factual basis for a guilty plea by examining "whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996). The trial court asked defendant how he wished to plead to the allegation that he had left the courtroom and failed to report thereafter; defendant replied "guilty." This response is not a sufficient factual basis *elicited from defendant* to support a finding that defendant was guilty of the offense. The trial court must elicit factual support sufficient to permit a trier of fact to conclude that defendant is guilty, not the bare conclusion itself.

In light of our conclusions above, we need not address defendant's contention that the trial court abused its discretion in denying his motion to vacate his sentence. Because the trial court did not elicit factual support for the finding of guilty from defendant and did not afford defendant sufficient notice of the charge to which he pleaded guilty, we reverse and remand for another probation hearing consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering